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No. 80-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,
Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, et al.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NEW ENGLAND POWER POOL EXECUTIVE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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The New England Power Pool Executive Committee hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consents of the Appellant and of two of the Appellees, the Commonwealth of Massachusetts and the State of Rhode Island, have been filed with this Motion. The other Appellees, the New Hampshire Public Utilities Commission, the State of New Hampshire, and the New Hampshire Legislative Utility Consumers' Council, have refused to consent to the filing of the brief as *amicus curiae*.

The New England Power Pool ("NEPOOL") is comprised of 78 private and public electric utilities which serve customers in the six New England states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.[1] Through NEPOOL, the participant utilities[2] have agreed to interconnect and coordinate the operation of their generation and transmission facilities in order to assure conformance to proper standards of electric service reliability and to attain maximum practicable economy in regional electric bulk power supply. Electric utilities participating in NEPOOL own and control substantially all of the bulk electric generation and transmission facilities in the six New England states. All NEPOOL activities are performed without regard to the boundaries of the New England states. Pursuant to the NEPOOL arrangements, the electric generating units of the participant utilities are centrally dispatched by the pool on the basis of maximum practicable economy, without regard to ownership. Electric energy generated by those units flows freely over the interconnected network of transmission facilities which is owned and operated by the NEPOOL participants in each of the New England states. In addition to coordinated operation, the NEPOOL arrangements provide for joint reliability review and planning of the bulk electric generating and transmission facilities needed to meet future customer needs throughout the region. NEPOOL is generally considered to be the most comprehensive electric power pooling arrangement in the United States. Economic Regulatory Administration, U.S. Dept. of Energy, *Power Pooling: Issues and Approaches* 1.23 (1980).

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1. This Motion and the accompanying Brief are filed on behalf of all NEPOOL participant utilities except Public Service Company of New Hampshire ("PSNH"). PSNH has requested the NEPOOL Executive Committee to inform the Court that PSNH is not joining in the Motion or Brief.

2. The NEPOOL participants, including the Appellant, are listed in Exhibit A of this Motion and Brief.

The New Hampshire statute and the order of the New Hampshire Public Utilities Commission ("PUC") at issue in this case will interfere with the operation of this interstate power pool. Indeed, the first question presented on appeal is whether the New Hampshire law and PUC order contravene the Commerce Clause of the United States Constitution. NEPOOL's presentation of the facts and law relative to the interstate commerce aspect of this case will supply the Court with information and legal argument either omitted or mentioned only in passing in the Jurisdictional Statement and the Motions to Dismiss or Affirm.

The second and third questions on appeal deal with the preemption of the New Hampshire statute and PUC order by federal law. A part of that federal law, particularly well known to NEPOOL, deals with regional pooling of electricity through pools operating as NEPOOL does in New England. Thus, in the exposition of facts and law which are relevant to this aspect of the preemption question, NEPOOL is uniquely situated to aid the Court in its evaluation of the importance of the questions presented on appeal.

The NEPOOL Executive Committee therefore urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The interest of the New England Power Pool ("NEPOOL") Executive Committee in this case is set forth in the accompanying Motion by the NEPOOL Executive Committee for leave to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The basic question in this appeal is the validity of New Hampshire's hydroelectricity export statute, N.H. R.S.A. 374:35, and of an order of the New Hampshire Public Utilities Commission ("PUC") issued pursuant to that statute. Taken together, the statute and order could substantially impede the multi-state cooperative effort of NEPOOL to assure the reliability of electric service and to minimize the cost of electricity in all of the New England states. The statute and order also undermine the federal regulatory scheme pursuant to which electric pooling operations are conducted in the six-state New England region.

ARGUMENT

Although the New Hampshire statute appears to contemplate control over the physical movement of electric energy in order to assure its availability for use within that state, the challenged PUC order does not act to restrict the movement of electric energy produced by the Connecticut River hydroelectric plants owned by New England Power Company ("NEP"). The NEPOOL Executive Committee therefore understands that the electric energy from these hydroelectric plants will continue to be generated subject to NEPOOL dispatch and that such energy will be delivered into the regional transmission network controlled

by NEPOOL. Based upon this understanding, the NEPOOL Executive Committee at this time has no reason to believe that the central dispatch of generating and transmission facilities by NEPOOL will be affected by the PUC order. Nevertheless, the PUC order does threaten achievement of the pool's goals of assuring a reliable bulk power supply for the New England region while attaining maximum practicable economy.

The NEPOOL arrangements are structured to achieve the pool's objectives through a number of activities in addition to the central dispatch of the region's bulk electric power facilities. Thus, the NEPOOL arrangements provide for sharing of the savings achieved by pool energy interchange transactions, joint participant facility planning, maintenance of minimum generating reserves, joint cooperation in environmental matters, and coordinated construction, operation and maintenance of the electric generation and transmission facilities owned or controlled by the pool participant electric utilities.

The PUC order will have the significant adverse effect on interstate commerce of discouraging coordinated planning and construction of electric generation and transmission facilities on a regional basis. The New England region, although relatively small, is divided into six states, which are served by a larger number of relatively small electric utilities. In order to conserve resources and to secure for their customers the economies of large-scale facilities, New England electric utilities have for many years worked together in the joint planning and joint ownership of generating units. For example, electric utilities from each of the six New England states are owners of interests in regionally-sized nuclear generating plants constructed, or under construction, in Maine, Ver-

mont, Connecticut, Massachusetts and New Hampshire.

While the jointly planned and owned facilities in New England to date have typically not included hydroelectric facilities, future large-scale conventional or pumped storage hydroelectric plants are very likely to be approached on a regional basis. Pumped storage generating plants are large hydroelectric projects which are frequently constructed and operated to complement nuclear generating plants. Two of these large-scale hydroelectric facilities already serve the New England region, having been constructed in Massachusetts by NEPOOL participants. If the challenged PUC order is allowed to stand, electric ratepayers in Massachusetts and Rhode Island, who have for many years supported the costs of NEP's hydroelectric plants in New Hampshire through their rate payments, will no longer continue to receive the economic benefits of lower cost electric energy produced by these plants. It is obvious that New Hampshire's action, if it is permitted to stand, will effectively inhibit NEPOOL participant electric utilities in any other state from participating in future conventional hydroelectric or pumped storage facilities located in New Hampshire.

The New Hampshire order is likely to affect adversely the joint planning and construction of major facilities other than hydroelectric plants. If allowed to stand, New Hampshire's action will act as an incentive to the other New England states to secure exclusive benefits for their citizens from the location of generation and transmission facilities in those states. State utility regulatory bodies will be unwilling to permit electric utilities subject to their jurisdiction to invest in the ownership of generating plants in another state when there is any risk that the output of such plants may be required to be sold to customers in the other state and therefore be of no benefit to the retail ratepayers of the owner utility.

The challenged PUC order will also interfere with the NEPOOL arrangements in areas other than regional planning. The pool arrangements assume that the generating facilities of each participant will be first utilized to serve the electric needs of that utility's customers. Any surplus capacity is then available to be shared by the other pool participants. For example, the electric energy produced by NEP's Connecticut River hydroelectric plants is presently considered to be first used to meet the electric service requirements of NEP's customers. Thus, the PUC order effectively destroys a basic premise of pool economics.

The adverse effect of the order on NEPOOL economic arrangements encompasses reserve obligations as well as energy transactions. If NEP is required to sell the electric output of its Connecticut River hydroelectric plants within New Hampshire, the capacity of those generating plants will no longer be considered to be available to meet the capacity requirements of customers which NEP is obligated to serve in Massachusetts and Rhode Island. NEP's responsibility to have specific amounts of electric generating capacity will not be changed, but the capacity available to meet its NEPOOL obligations will be reduced by approximately 420 megawatts. Therefore, NEP's capacity planning within the NEPOOL framework will be jeopardized.

In addition to interfering with the operation of specific pool arrangements, New Hampshire's challenged action imperils NEPOOL by threatening the cooperative spirit which has been essential to the formulation and operation of a comprehensive regional pool. The NEPOOL arrangements are the result of an extraordinary consensus among the electric systems throughout the six New England states (large and small, rural and urban, publicly-owned and

privately-owned). These utilities recognized that through cooperative efforts they could secure their common primary goals of more reliable and less expensive electric service for their customers throughout the six-state region. NEPOOL also owes its existence and successful operation to the cooperative efforts of the governmental authorities of each of the six New England states.

The challenged PUC order imperils the environment of state cooperation which is needed to support NEPOOL. The utilities participating in NEPOOL are each owned by subdivisions of the states or have the conduct of their electric businesses dependent upon state grants of authority and favorable state regulation. If the PUC order is allowed to stand, other states will almost certainly consider efforts to secure comparable short-term economic benefits for their citizens. As each of the New England states seeks to engage in a competitive effort to secure economic advantage or redress, the cooperative foundation of NEPOOL's delicately balanced structure of interconnection and coordination arrangements may well be destroyed.

If the challenged PUC order is allowed to interfere with the NEPOOL arrangements, the adverse effects will have both regional and national significance. Congress has repeatedly recognized a special national interest in the transmission and sale of electric energy between the states. Voluntary regional electric pools, such as NEPOOL, have been expressly recognized by Congress as the appropriate organizational arrangement for securing the objective of assuring an abundant national supply of electric energy with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. Federal Power Act, Section 202(a), 16 U.S.C. § 824a(a).

The NEPOOL arrangements were filed with the Federal Power Commission ("FPC"), predecessor to the Federal

Energy Regulatory Commission. NEPOOL was thereafter the subject of an extensive investigation under Part II of the Federal Power Act. *New England Power Pool Agreement, Opinion* Nos. 775, 775-A (FPC 1976), *aff'd sub nom., Municipalities of Groton v. Federal Energy Regulatory Commission*, 587 F.2d. 1296 (D.C. Cir. 1978). The FPC expressly determined that the NEPOOL arrangements conform to the mandates of the Federal Power Act and other applicable federal statutes. In particular, the FPC found that the NEPOOL arrangements advance the national policy of promoting and encouraging regional interconnection and coordination of electric facilities for the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. *New England Power Pool Agreement*, Initial Decision, FPC Docket No. E-7690 at 9-11 (1975), *modified on other grounds*, Opinion No. 775 (1976); Federal Power Act, Section 202(a), 16 U.S.C. § 824a(a). New Hampshire's challenged effort to secure for its citizens the exclusive economic benefit of hydroelectric energy generated within that state jeopardizes attainment of these national policies through NEPOOL, and clearly presents important federal questions.

CONCLUSION

This case presents important federal questions regarding the constitutional prohibition of interference by the states with interstate commerce and concerning the preemption of the New Hampshire law and PUC order by

federal law. No decision of this Court has addressed these questions. Probable jurisdiction should be noted.

Respectfully submitted,

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EXHIBIT A

LIST OF NEPOOL PARTICIPANTS

Allied Power and Light Company
Town of Ashburnham Municipal Light Plant
Bangor Hydro-Electric Company
Blackstone Valley Electric Company
Boston Edison Company
Town of Boylston Municipal Light Department
Town of Braintree Electric Light Department
Burlington Electric Light Department
Cambridge Electric Light Company
Canal Electric Company
Central Maine Power Company
Central Vermont Public Service Corporation
City of Chicopee Municipal Lighting Plant
Citizens Utilities Company
The Connecticut Light and Power Company
Connecticut Municipal Electric Energy Cooperative
Town of Danvers Electric Department
Eastern Edison Company
Village of Enosburg Falls
Fitchburg Gas and Electric Light Company
Town of Georgetown Municipal Light Department
Granite State Electric Company
Green Mountain Power Corporation
Town of Groton Electric Light Department
Village of Harwick Electric Department
The Hartford Electric Light Company
Town of Hingham Municipal Lighting Plant
Town of Holden Municipal Lighting Plant
City of Holyoke Gas & Electric Department
Holyoke Power and Electric Company
Holyoke Water Power Company
Hudson Light and Power Department
Town of Hull Municipal Light Department
Village of Hyde Park
Town of Ipswich Municipal Electric Department
Village of Johnson
Town of Littleton Electric Light & Water Department
Village of Ludlow Electric Light Department
Village of Lyndonville

Town of Mansfield Municipal Electric Department
Town of Marblehead Municipal Light Department
Massachusetts Electric Company
Massachusetts Wholesale Electric Company
Town of Middleborough Gas & Light Department
Town of Middleton Municipal Electric Department
Montaup Electric Company
Village of Morrisville Water & Light Department
The Narragansett Electric Company
New Bedford Gas and Edison Light Company
New England Power Company
Newport Electric Corporation
Town of North Attleborough Electric Department
Village of Northfield
Village of Orleans
Pascoag Fire District
Town of Paxton Municipal Light Department
City of Peabody Municipal Light Plant
Princeton Municipal Light Department
Public Service Company of New Hampshire
Town of Reading Municipal Light Department
Village of Readsboro
Rochester Electric Light & Power Company
Town of Shrewsbury Electric Light Plant
Town of South Hadley Electric Light Department
Town of Sterling Municipal Electric Light Department
Village of Stowe
Village of Swanton
Taunton Municipal Lighting Plant
Town of Templeton Municipal Lighting Plant
The United Illuminating Company
Vermont Electric Co-op, Inc.
Vermont Electric Power Company, Inc.
Vermont Marble Company
Town of Wakefield Municipal Light Department
Washington Electric Cooperative, Inc.
Western Massachusetts Electric Company
Town of West Boylston Municipal Lighting Plant
City of Westfield Gas and Electric Light Department